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No. 94-283

In The

Supreme Court of the United States

October Term, 1994

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
H. L. SMITH, G. D. McLAUGHLIN
and L. D. WILSON,

Petitioners,

vs.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
LOUISIANA & ARKANSAS RAILWAY COMPANY,
and UNITED TRANSPORTATION UNION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF RESPONDENT UNITED TRANSPORTATION UNION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Section 2 Fourth or Eleventh (c) of the Railway Labor Act, 45 U. S. C. Section 152 Fourth and Eleventh (c) make unlawful an agreement between the Kansas City Southern Railway Company and its train service employees' collective bargaining representative, United Transportation Union, whereby train service employees are required to pay dues to United Transportation Union in order to continue to accumulate train service seniority when working outside the train service crafts in engine service.

2. Whether the engine service craft collective bargaining representative as well as individual employees who hold engine service and train service seniority were entitled under the Railway Labor Act to notice of, and participation in, the negotiation or arbitration of the agreement referred to in Question No. 1.

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OPINIONS BELOW AND JURISDICTION

Respondent accepts Petitioners' identification of the Opinions Below and the Jurisdiction of the Court. The Opinion below is reported at 26 F. 3d 787 (8th Cir. 1994).

STATUTORY PROVISIONS INVOLVED

With regard to "Statutory Provisions Involved", the Petition identifies several through the inclusion of Appendix C, Petitioners' Appendix ("Pet. App."), pp. 37a-43a. We note two points in regard to this identification of "Statutory Provisions Involved".

In Appendix C, Petitioner includes Section 2 Third of the Railway Labor Act, 45 U. S. C. Section 152 Third. (Pet. App. 40a.) While this provision of the Act was urged by Petitioners and rejected in the Court below, there is no argument in the Petition for Certiorari concerning Section 2 Third and accordingly, it should not be deemed "involved" in this Petition.

In regard to Petitioners' second "Question Presented", the statutory provision upon which the court below resolved the "Question", namely Section 6 of the Railway Labor Act, 45 U. S. C. Section 156, 26 F. 3d at 791-92 (Pet. App. 6a-9a), should be deemed a "Statutory Provision Involved" but is not included in Petitioners' Appendix.

STATEMENT OF THE CASE

This was an action by Petitioners Brotherhood of Locomotive Engineers ("BLE"), a labor organization, and three individuals who are employed and hold train service and engine service seniority with the Kansas City Southern Railway Company ("KCS"). BLE is the craft bargaining representative under the Railway Labor Act ("RLA"), 45 U. S. C. Section 151 *et seq.*, for the engineer

craft on KCS. United Transportation Union ("UTU") is the RLA craft bargaining representative for the train service craft employees on KCS.

Petitioners sued KCS and UTU over what was denominated Side Letter No. 3 to an arbitration award of March 19, 1992. The arbitration was an "interest" arbitration that resolved collective bargaining issues.

The disputed Side Letter No. 3 provided that effective with the date of the award, KCS train service employees transferring to engine service who wish to continue to accumulate more train service seniority while so working outside of train service, must pay dues to UTU during that time. The side Letter did not take away seniority upon transfer out of train service, but required the payment of dues to UTU for further accumulation while outside the train service craft. While the employee is in train service, or upon return to train service, the Side Letter does not apply. 26 F. 3d at 790-91 (Pet. App. 5a-6a.)

Petitioners filed a three count complaint challenging the Side Letter under the RLA. Count One alleged that Side Letter No. 3 should be invalidated on the basis of Section 3 First (q) of the RLA, 45 U. S. C. Section 153 First (q) on grounds that the Side Letter was outside the arbitration board's jurisdiction and that the Side Letter did not conform to the RLA in that BLE and the engineer employees were not given notice nor the opportunity to participate in the arbitration proceedings. (Appellants' Appendix in the court below, "AA", 5-7.)

Count Two alleged RLA Section 2 Third, Fourth, Fifth and Eleventh violations; Count Three alleged RLA Section 2 Fifth and Eleventh violations.

On cross motions for summary judgment, the district court granted Respondents' (defendants-appellees below) motions for summary judgment. (Pet. App. 19a-36a.) The district court was affirmed by the Eighth Circuit Court of Appeals without dissent. 26 F. 3d 787 (9th Cir. 1994); Pet. App. 1a-18a.

SUMMARY OF THE ARGUMENT

The petition for a writ of certiorari should be denied because Petitioners have established no basis for review by this Court. First, the opinion below is not in conflict with any other court of appeals decision. Each court to have considered the validity of the type of agreement at issue here has rejected Petitioners' RLA Section 2 Fourth and Eleventh claims, including two courts of appeals and three district courts. In addition to the decisions of the court of appeals and district court below, the same RLA challenges to such an agreement as is involved here were rejected in the court of appeals and district court in *Dempsey v. The Atchison, Topeka and Santa Fe Railway Company*, 16 F. 3d 832 (7th Cir. 1994), with denial of a request for reconsideration by the panel and denial of hearing *en banc*, no judge of the court of appeals asking for hearing, *petition for certiorari pending*, No. 93-2015, June 21, 1994; and by the district court in *Carr v. Chicago, Central and Pacific Railroad Co.*, No. 92-C-5943, 1994 WL 234567 (n. D. Ill. May 26, 1994), appeal pending, No. 94-2531.

Second, the courts below properly held that where only the UTU-KCS agreement, and not any BLE-KCS agreement, was involved in the negotiations or "interest" arbitration, the RLA did not require notice to, or an opportunity for, participation by BLE. The court properly rejected Petitioners' reliance in this regard upon RLA Section 3, 45 U. S. C. Section 153, provisions for judicial review of grievance arbitration awards.

Third, the court below properly applied the law under Section 2 Fourth and the decisions of this Court in *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants,* 489 U. S. 426 (1989) and *Virginian Railway Co. v. System Federation,* 300 U. S. 515 (1937). Section 2 Fourth prohibits carriers from acting with anti-union animus and from attempting to undermine, impair, or destroy a bargaining relationship. As the courts below noted, the undisputed facts here showed neither the requisite animus nor an attack on BLE as the bargaining representative.

Finally, the courts below properly found that RLA Section 2 Eleventh (c) has no application because that provision applies only where there is an agreement made pursuant to subparagraph (a), that is, one that requires union membership "as a condition of continued employment". The Side Letter at issue here requires union dues only as an option for accrual of additional seniority while working outside the craft, and does not require membership as a condition of continued employment.

ARGUMENT AND AUTHORITIES FOR DENIAL OF THE WRIT

I. PETITIONERS HAVE PRESENTED NO CREDIBLE REASON FOR THIS COURT TO GRANT THE WRIT OF CERTIORARI

Petitioners have not identified a reason for this Court to review the decision below. There is certainly no conflict among the Circuits. Indeed, the two courts of appeals to address the issue of the validity of the agreement at issue have each made a similar analysis to firmly reject Petitioners' position. In addition to the decision in the Court of Appeals for the Eighth Circuit in the present case upholding the agreement under Sections 2 Third and Fourth, see also *Dempsey v. The Atchison, Topeka and Santa Fe Railway Company*, 16 F. 3d 832 (7th Cir. 1994), *petition for certiorari pending*, No. 93-2015. In both the *Dempsey* case from the Seventh Circuit and the present case, the courts of appeals affirmed summary judgment that had been granted by the district court. A third district court has also granted summary judgment on the same legal basis in *Carr v. Chicago Central and Pacific Railroad Company*, No. 92-C-5943, 1994 WL 234567 (N. D. Ill. May 26, 1994), appeal pending, No. 94-2531, United States Court of appeals for the Seventh Circuit.

Nor is there an "improtant issue of federal law. . . . " S. Ct. Rule 10. Petitioners' claims involve relatively arcane issues of RLA Section 2 Fourth and 2 Eleventh law and do *not* involve the threat of substantial labor disputes, terminations of employment or similar matters that are frequently the subject of litigation in the federal courts. The decision below simply requires an affected

train service employee to pay dues to UTU in order to continue to accumulate additional train service seniority while working outside the train service craft. This is not the type of substantial labor dispute that requires this Court's attention.

II. THE COURT BELOW DID NOT MISAPPLY THE RLA NOR DECISIONS OF THIS COURT IN REJECTING PETITIONERS' CLAIM THAT THEY WERE ENTITLED TO NOTICE AND PARTICIPATION IN THE NEGOTIATIONS OR ARBITRATION

Petitioners claim an RLA right to notice and an opportunity to participate in bargaining and interest arbitration concerning Side Letter No. 3. (Pet. 20-23.) The court below treated this issue first, noting that Petitioners did not indicate a specific RLA provision relied upon in this regard. In the absence of such, the court made the assumption that Petitioners relied upon Section 6 of the RLA, the provision of the law that generally regulates the commencement of bargaining. 26 F. 3d at 791. (Pet. App. 6a.)

The court below rejected Petitioners' claim to notice and participation on the basis that RLA bargaining pertains to agreements as to "rates of pay, rules, or working conditions", and that no BLE agreement pertaining to such was involved or impacted by the negotiations and arbitration of the disputed Side Letter. Accordingly, Petitioners had no RLA right to notice of, or participation in, the bargaining and arbitration. 26 F. 3d at 791-92 (Pet. App. 6a-9a.)

Contrary to Petitioners' suggestion (Pet., p. 10, fn. 2), the court below recognized and acknowledged that the Side Letter agreement " . . . was a part of the final arbitration package." 26 F. 3d at 790. (Pet. App. 4a.) The court, however, properly drew no distinction between the matter of BLE's entitlement to notice of the negotiations and notice of the interest arbitration. As the court said, the railroad's duty to bargain "does not extend to the certified representative of a craft or class whose collective bargaining agreement is not the subject of the dispute". " . . . [T]he agreement that was changed was between UTU and KCS, not between BLE and KCS." 26 F. 3d at 792. (Pet. App. 8a-9a.) If there were no entitlement of BLE to notice concerning bargaining over the UTU-KCS agreement for Side Letter No. 3, then there would no basis for notice for an "interest" arbitration over that same matter.

As to Petitioners' claim that all affected employees as well as the BLE were entitled to similar notice and a right to participate in the negotiations (Pet. p. 21), the court below properly rejected this suggestion, citing *McMullans v. Kansas, Oklahoma & Gulf Railway*, 229 F. 2d 50, 56 (10th Cir. 1956), *cert. denied*, 351 U. S. 918 (1956). 26 F. 3d at 791. (Pet. App. 9a.) Indeed to conceive of the event is to refute the idea. No collective bargaining could meaningfully take place were it to be the law that all employees could participate if they elected to do so.

In their Petition to this Court (pp. 20-22), Petitioners rely principally upon RLA Section 3 cases such as *Transportation-Communications Union v. Union Pacific Railroad Co.*, 385 U. S. 157 (1966), *United Transportation Union v. Burlington Northern, Inc.*, 563 F. 2d 1279 (8th Cir. 1977), and *United Transportation Union v. Burlington Northern,*

Inc., 470 F. 2d 813 (8th Cir. 1972), *English v. Burlington Northern Railroad*, 18 F. 3d 741 (9th Cir. 1994); and *Cole v. Erie Lackawanna Ry.*, 541 F. 2d 528 (6th Cir. 1976) where grievance arbitration was involved, not contract negotiation and interest arbitration. Most significantly, in those cases, the party claiming notice and rights to participation in arbitration, either an individual grievant as in *Cole*, or an organization as in *Transportation-Communications Union*, was asserting specific labor contract rights of its or his own that were at issue in the arbitration proceeding.

Petitioners' reliance upon *Brotherhood of Locomotive Firemen and Enginemen v. National Mediation Board*, 410 F. 2d 1025 (D. C. Cir. 1968) and *Illinois Central R. Co. v. Brotherhood of Locomotive Engineers*, 443 F. 2d 136 (7th Cir. 1971) was properly deemed of no significance by the court below. Both cases involved claims of bargaining participation where there was direct involvement of the claimant organization's labor contract, in the former case, two organizations claiming rights to represent a new class of employees, in the latter case, the claimant organization asserting a right to negotiate to preserve its part of an existing tri-partite agreement.[1]

By contrast, as the court below said, in the present case, no BLE agreement right was involved in the negotiations or arbitration so that no notice or participation was mandated.

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[1] As to *Brotherhood of Locomotive Firemen and Enginemen v. National Mediation Board*, the Court of Appeals deemed the dispute not one for the courts in any event, but one for the National Mediation Board should the dispute ever become "ripe".

III. THE COURT BELOW DID NOT MISAPPLY SECTION 2 ELEVENTH (C)

In a footnote, Petitioners assert the claim that Side Letter No. 3 violated Section 2 Eleventh (c) of the RLA, 45 U. S. C. Section 152 Eleventh (c). (Pet. 15, fn. 5.) The court below rejected this contention based upon the specific language of Section 2 Eleventh. First, it was noted that by its own terms, subparagraph (c) was plainly a qualifier to subparagraph (a) of Section 2 Eleventh. The qualifier of (c) only operates in regard to an agreement made pursuant to subparagraph (a). Subparagraph (a) concerns an agreement requiring union membership where such is a "condition of continued employment". The seniority agreement in the Side Letter at issue did not create a condition of continued employment. Rather the train service employee working in engine service would continue employment, but would simply have the option of accumulating more train service seniority even though working in engine service upon payment of dues to UTU. 26 F. 3d at 792-94. (Pet. App. 10a-11a).

The cases relied upon by Petitioners (Pet. 10, fn. 5), *Birkholz v. Dirks*, 391 F. 2d 289 (7th Cir. 1968), *vacated as moot*, 395 U. S. 210 (1969) and *O'Connell v. Erie Lackawanna R. R.*, 391 F. 2d 156 (2nd Cir. 1968), *vacated as moot*, 395 U. S. 210 (1969) plainly involved agreements where union membership was a "condition of continued employment" and the court below properly deemed them of no significance.[2]

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[2] Contrary to Petitioners' suggestion, while the court below did not identify these cases by name, it did respond to them to

IV. THE SECTION 2 FOURTH CLAIM: THE COURT BELOW DID NOT MISAPPLY *TRANS WORLD AIRLINES, INC. V. INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS* NOR OTHER DECISIONS OF THIS COURT

The court below did not misapply *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants*, 489 U. S. 426 (1989) and Section 2 Fourth of the RLA. The court of appeals recognized that the primary thrust of Section 2 Fourth's prohibition of carrier "interference or coercion" concerned protection of employee rights of self-organization in the pre-certification period, that is, before a collective bargaining representative is identified or certified under the Act. In doing so, the court below, 26 F. 3d at 795 (Pet. App. 16a-17a), relied upon the precise language of *Trans World Airlines, Inc.* in which this Court noted:

> Section 2 Fourth was enacted as part of the 1934 amendments to the RLA. 48 Stat. 1185. From the time of our very first opportunity to interpret the 1934 amendments, *we have viewed them as addressing primarily the pre-certification rights and freedoms of unorganized employees.* In *Virginian Railway Co. v. Railway Employees*, 300 U. S. 515 (1937), we observed that the employees' freedom "to organize and make choice of their representatives without the 'coercive interference' and 'pressure' of a company union . . . was continued and made more explicit by the amendment of 1934. *Id.*, at 543, citing Section 2

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reject them as part of an argument, not renewed here, but which the court below saw as not "based . . . upon anything in the record". 26 F. 3d at 793, fn. 5. (Pet. App. 11a, fn. 5.)

> Third, Section 2 Fourth, and *Texas and N. O. R. Co. v. Railway Clerks*, 281 U. S. 548 (1930). In *Switchmen's Union v. National Mediation Bd.*, 320 U. S. 297 (1943), the Court divided over whether the federal courts have jurisdiction under Section 2 Fourth to review a certification of union representatives for collective bargaining by the National Mediation Board acting under Section 2 Ninth of the RLA as amended in 1934. Both the majority and the dissent agreed, however, that *"[t]he 1934 Act was directed particularly at control over the initial step in collective bargaining – the determination of the employees' representatives."* *Id.*, at 317 (Reed, J. dissenting); see also id., at 302 (opinion of the Court); *Machinists v. Street*, 367 U. S. 740, 759 (1961).

489 U. S. at 440-41 (emphasis added).

The "explanation for this pre-certification focus" of Section 2 Fourth was that the RLA is designed to provide for private dispute resolution, and the effectiveness of this process "depends upon the initial assurance that the employees' putative representative is not subject to control by the employer. . . . " 489 U. S. at 439-40.

Nevertheless, the court below recognized that Section 2 Fourth was not exclusively concerned with pre-certification conduct of the employer. In accord with the general purpose of the RLA 1934 amendments to protect the employees' choice of a bargaining agent, and in accord with *Trans World Airlines, Inc.*, at 442 (*Trans World Airlines, Inc.* like the instant matter involved post-certification actions of the employer), the court below held

that after certification, Section 2 Fourth (as well as Section 2 Third) prohibited employer conduct that was motivated by "anti-union animus" or constituted an "attempt to interfere with its employees' choice of their collective bargaining representative". The court below cited its own *Tello v. Soo Line Railroad*, 772 F. 2d 458, 462 (8th Cir. 1985) (as to Section 2 Third) and *National Railroad Passenger Corp. v. International Ass'n of Machinists & Aerospace Workers*, 915 F. 2d 43, 51 (1st Cir. 1990) (as to Section 2 Fourth). Finding "nowhere in the record before us" any evidence of such anti-union animus, interference with bargaining, or hostility toward BLE as bargaining agent, the court properly concluded that summary judgment on both the Section 2 Third and 2 Fourth claims was appropriate. 26 F. 3d at 795. (Pet. App. 17a-18a.)

Other Circuits that have addressed the scope of Section 2 Fourth have been in accord with the court below. In *Dempsey v. The Atchison, Topeka and Santa Fe Railway Company*, 16 F. 3d 832 (7th Cir. 1994), *petition for certiorari pending*, No. 93-2015, the Seventh Circuit Court of Appeals upheld a nearly identical seniority accumulation agreement under Section 2 Fourth concluding that as to post-certification employer action, the complainant must, but did not, show conduct, that in the language of *Trans World Airlines, Inc.*, at 442, would "strike a fundamental blow" to the "collective bargaining process itself". See also, *Renneisen v. American Airlines, Inc.*, 990 F. 2d 918, 922 (7th Cir. 1993); *Independent Union of Flight Attendants v. Pan American World Airways, Inc.*, 789 F. 2d 139, 142 (2nd Cir. 1986).

Section 2 Fourth relief, whether denied or granted, has been deemed available in the post-certification period

where there is an attack on the bargaining process or the bargaining agent. *Compare International Ass'n of Machinists v. Northwest Airlines, Inc.*, 673 F. 2d 700, 706 (3rd Cir. 1982) (limited rights outside the representational context); *Air Line Pilots Association v. Texas International Airlines, Inc.*, 656 F. 2d 16 (2nd Cir. 1981) (Section 2 Third or Fourth relief only where carrier threatens fundamental provisions of the law such as in company union cases, citing *Texas and New Orleans R. Co. v. Railway Clerks*, 281 U. S. 548 (1930)) and *Virginian Railway Co. v. System Federation*, 300 U. S. 515 (1937), *with Air Line Pilots Association v. Transamerica Airlines, Inc.*, 817 F. 2d 510 (9th Cir. 1987), *cert. denied*, 484 U. S. 963 (1988) (diversion of bargaining unit work to subsidiary to eliminate bargaining unit altogether); *Ruby v. Taca International Airlines, S.A.*, 439 F. 2d 1359 (5th Cir. 1974) (removal of crew base to foreign country with likely destruction of bargaining altogether).

The decision below was not in conflict with *Steele v. Louisville & Nashville R. Co.*, 323 U. S. 192 (1944), *Ellis v. Brotherhood of Railway and Airline Clerks*, 466 U. S. 435 (1984) nor *Communications Workers v. Beck*, 487 U. S. 735 (1988) as Petitioners suggest. (Petition, pp. 14, 23, 24.) *Steele* concerned an RLA claim of a breach of the duty of fair representation, while *Beck* concerned a fair representation claim under the Labor Management Relations Act ("LMRA"), 29 U. S. C. Section 151 *et seq.* A fair representation claim is a discrete statutory claim under either RLA or LMRA, and no such claim has ever been asserted in the present case. While *Ellis* did concern Section 2 Eleventh of the RLA, it (as well as *Beck* under LMRA) concerned issues of the statutory or constitutional rights of individuals to be free from paying dues to support non-

collective bargaining activities of the collective bargaining representative. No such issues are present here. Finally, in both *Ellis* and *Beck*, the agreements at issue provided that membership in the labor organization was a condition of continued employment whereas the agreement in the present case does not so establish a condition of continued employment.

Because there is authority under the RLA interpreting and applying Section 2 Fourth in the limited fashion described, the court below properly declined to rely upon the above LMRA case law that Petitioner cites, nor additional cases such as *Radio Officers Union v. NLRB*, 347 U. S. 17 (1954) (involving LMRA Section 8 (a)(3) and 8 (b), the latter of which has no counterpart whatever under RLA), *Pattern Makers League v. NLRB*, 473 U. S. 95 (1985) (involving LMRA Section 8 (b) that is without any counterpart whatever under RLA), or the Seventh Circuit's *NLRB v. Manitowoc Engineering Co.*, 909 F. 2d 963 (7th Cir. 1990) (involving again LMRA Section 8 (a)(3) and 8 (b)). This Court has consistently said that while "carefully drawn" analogies from LMRA may be looked to for guidance under RLA, the LMRA "cannot be imported wholesale" into RLA. *Trans World Airlines, Inc.* at 439. As described there and in *Virginian Railway Company, supra*, Section 2 Fourth has its own distinct history that has established the scope of prohibited employer conduct.

The recent *Hawaiian Airlines, Inc. v. Norris*, 512 U. S. ___, 62 U. S. L. W. 4537 (June 20, 1994), relied upon by Petitioners (Pet. 13-14), does not yield a different conclusion. That case involved the issue of pre-emption of state law claims by the RLA where this Court determined to

rely upon LMRA precedent because it was recognized that this Court's RLA decisions concerning pre-emption had long been in accord with its LMRA decisions. There had been a "convergence in the pre-emption standards under the two statutes. . . . " 62 U. S. L. W. at 4541-42.

By contrast, in regard to the Section 2 Fourth protections of employees, this Court's *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants, supra,* demonstrates that there has not been a convergence, but rather differences between the two statutes based upon the language and history of the law. See also, *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.,* 394 U. S. 369, 385, fn. 20 (1969) (Section 2 Fourth RLA employee rights to choose a labor organization not comparable to LMRA where former statute concerned "strongly orgnaized" labor organizations and latter concerned "embryo organizations" in need of greater protections).

Accordingly, the court below did not misapply *Trans World Airlines, Inc.* nor other decisions of this Court, nor misinterpret Section 2 Fourth.

V. CONCLUSION

The decision below was in accord with the language of the RLA, the decisions of this Court, and the authorities in the Circuits. Accordingly, the Petition should be denied.

Respondents The Kansas City Southern Railway Company and Louisiana & Arkansas Railway Company have authorized undersigned Counsel of Record to state

that they join in the views and contentions set forth herein.

Respectfully submitted,

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